APPENDIX

A. Decision of the United States Court of Appeals, Fourth Circuit, No. 81-5312 21

B. Decision of the United States Court of Appeals, Fourth Circuit, denying rehearing, No. 81-5312 26

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5312

UNITED STATES OF AMERICA
Appellee,

versus

DORSEY RAY LANG and
ROY LEE BUTTERWORTH, JR.
Appellants.

No. 81-5313

UNITED STATES OF AMERICA
Appellee,

versus

HENRY FAIRLEY LANEY
Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Judge Woodrow W. Jones.

Argued: April 1, 1982 Decided: June 14, 1982

Before BRYAN, Senior Circuit Judge, MURNAGHAN AND ERVIN, Circuit Judges.

M. Randall Peek; Karen Z. Mashburn for Appellants; E. Fitzgerald Parnell, III, Assistant United States Attorney (Charles R. Brewer, United States Attorney on brief) for Appellee.

PER CURIAM:

In consolidated appeals, Dorsey Ray Lang and Roy Lee Butterworth, Jr., with Henry Fairly Laney, lay fault to several aspects of their trials for criminal conspiracy and receipt of stolen property. We affirm.

I

On September 26, 1978, Malcolm L. Mangum stole a tractor-trailer rig from the R. G. Stegall Trucking Co. in Charlotte, North Carolina. The rig, worth approximately $35,000, was loaded with 29,965 pounds of Nestle coffee valued at $65,000. From the Stegall lot, Mangum drove to a service station off Interstate 85 where he met an accomplice, George Edward Franklin. After obliterating with silver tape all identification on the rig, they left with the vehicle for suburban Atlanta.

There Franklin telephoned defendants Dorsey Ray Lang and Roy Lee Butterworth, Jr. and arranged to meet in the parking lot of a roadside restaurant. Upon arrival of Lang and Butterworth, the four agreed to take the hijacked rig to Lang and Butterworth's place of business, Truckline Salvage, in Douglasville, Georgia. There, the trailer was disconnected from the tractor and opened to ascertain whether it contained "a solid load of goods." According to Franklin's trial testimony, he responded at this time to Butterworth's question as to how Mangum had obtained the truckload by saying "he told me he just drove it off," meaning "that he stole it from Stegall trucking."

While at Truckline Salvage, the participants discarded the trailer's tag and took the registration card out of the cab. Discussions ensued about disposition of the coffee lading. Butterworth and Lang mentioned they had never heard of "Nestle's decaffeinated instant coffee" and doubted whether they could sell the cargo. With Mangum insisting on $10,000 for the load, Butterworth and Lang agreed to finance the purchase of it by Franklin with each giving him $5,000 in cash.

All four men then returned to the roadside restaurant where they first met to consummate the deal. There Butterworth and Lang each handed $5,000 to Franklin, and, in turn, Franklin gave Mangum $7,000. Thereupon the cab was taken to a rural location outside Homer, Georgia, where it was abandoned.

Franklin, Lang, and Butterworth reassembled at Truckline Salvage to discuss their next move. Although Butterworth and Lang repeated their lack of interest in purchasing the coffee,

they decided to help Franklin to sell it. Eventually, Franklin met defendant Henry Fairley Laney of Indian Trail, North Carolina, near Charlotte, who agreed to buy the coffee. To effecutate the transaction, Franklin hired Thomas Jefferson Hester for $500 to take the trailer to Laney's home in North Carolina. With the shipment discharged there, and Laney paying Franklin $29,680 for it, Hester returned the trailer to Atlanta and delivered it to Herbert Spencer Feldman who, in turn, sold it to undercover F.B.I. agents for $1,000. With the money in hand, Franklin went back to Atlanta and repaid Butterworth and Lang the previous week's loan, plus $2,000 interest.

The complexities unraveled some weeks later when Roland E. Merck of Drexel, North Carolina, an innocent buyer of some of the coffee from Laney, read in a local newspaper of the coffee heist. He promptly notified the F.B.I. and their subesquent pursuits led to the prosecution of Lang, Butterworth, Laney, and their accomplices.

Indictments of Franklin, Mangum, Lang, Butterworth, Laney, Hester, and Feldman followed June 1, 1981 for criminal conspiracy, *see* 18 U.S.C. §371 (1976), and a variety of substantitive offenses including receipt of stolen property, *see id.* §659, and sale of stolen property, *see id.* §2315. Franklin, Mangum, Hester, and Feldman enetered pleas of guilty to one or more of the charges. Butterworth, Lang, and Laney, however, each pleading not guilty, were tried and convicted in August 1981. Laney was convicted of conspiracy and receipt of stolen trailer, and receipt of stolen chattels. Butterworth and Lang assign nine separate errors on this appeal while Laney proffers two grounds for reversing his conviction. Because all of the ascribed infimities grew out of a single trial, they have been consolidated on this appeal.

II

A

In the course of trial, the Government put in testimony linking all three defendants to other crimes or improper conduct. As to defendant Laney, F.B.I. Agent Roger Schweikert testified to a conversation with Laney, some fourteen months after the instant conspiracy, about the latter's capacity to handle "hot" property. Another such Agent, Fred Robinette, gave evidence of an attempted sale of stolen sugar to defen-

dants Lang and Butterworth about one year after the coffee theft now before us. Defendants question this proffer, suggesting that events of a year or more after the crime are irrelevant as too remote and, further, that even if the evidence was probative, its value was outweighed by its prejudicial impact.

In analyzing these objections, we must begin with the pertinent rules of evidence. Fed.R.Evid. 404(b) admits evidence of extrinsic wrongs, provided such proof is not adopted to establish bad character, but instead is directed to intent, knowledge, absence of mistake, or some other permissible purpose. Even if such evidence is admissible under Rule 404(b), Rule 403 nevertheless commands exclusion "if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Fed.R. Evid. 403.

Our earlier decisions construing Rules 403 and 404(b) indicate that probative value is defined to include relevance, necessity and reliability. *United States v. Hadaway,* No. 81-5065, slip op. at 5 (4th Cir. June 10, 1982); *United States v. DiZenzo,* 500 F.2d 263, 266 (4th Cir. 1974). Canvass of the instant record reveals that the evidence now questioned matches each of these tests. Both the nature of the accusations and the defendants' pleas put the element of intent or knowledge directly in issue.

Furthermore, ascertainment of an individual's mental state at the time he allegedly committed an offense typically raises a problem of proof. This burden generally can be satisfied only by showing one or more overt acts from which the jury could infer the defendant's state of mind when committing the offense. In this case, testimony about defendants' involvement in other transactions in stolen goods obviously gave the jury a basis for concluding that defendants knew they were receiving stolen property.

Finally, there was no question that the testimony of the F.B.I. agents was reliable and trustworthy. At all events, ample opportunity was afforded defendants to cross-examine or otherwise impeach these witnesses. Hence we view the challenged statements as undeniably probative, with any prejudice accruing to defendants' detriment as, at worst, minimal.

Citing *United States v. Jiminez,* 613 F.2D 1373 (5th Cir. 1980), appellants insist that evidence of a subsequent extrinsic crime or bad conduct is inadmissible if the act occurred one year or more after the indicted crime. They maintain, therefore, that even if this evidence otherwise was allowable it should have been stricken because it was too attenuated in

time, from the commission of the crime on trial, as to give enlightenment on their frame of mind. We believe defendants misread *Jiminez*.

There the Court was weighing a one-year delay as a factor affecting admissibility, but the Court's ruling against the evidence rested more on the fact that the testimony concerning the subsequent crime was unreliable. Additionally, the later offense was limited in relevance to defendant's predisposition. In that context, a one-year delay indeed may be too long.

By contrast, the evidence of instant defendants following offenses was reliable and quite pertinent to the inquiry as to their knowledge that the trailerload of coffee was stolen. Further, we already have rejected any doctrine that the temporal proximity of another crime must be limited to a certain period attending the indicted crime. *See United States V. Hadaway*, No. 81-5065, slip op. at 6 (4th Cir. June 10, 1982). This we hold that defendants have failed to demonstrate that the District Court's holding was an abuse of its discretion. *See United States v. Mastrototaro*, 455 F. 2d. 802, 803 (4th Cir.), *cert. denied*, 406 U.S. 767 (1972).

B

Defendants Lang and Butterworth additionally press objections (a) to the Court's refusal to grant a continuance when their lead counsel was prevented from attending the first day of their trial, (b) the adequacy of the evidence to sustain their convictions, and (c) admissibility of several items of evidence. Observing no error, we reject these assignments.

C

Finally, defendant Laney avers that the joinder of his, with the trial of Lang and Butterworth, prejudiced him by exposure to an unfair risk of guilt by association. To the contrary, we see the District Court as guardedly exercising its discretion in joinder of trials. Fed. R.Crim.P. 8(b) requires of this procedure only that the common defendants be accused with participating in "the same act or transaction or the same series of acts or transactions." Where, as here, a seven-person conspiracy is indicted, joinder clearly is proper and, in any event, the question of prejudice to defendant Laney is a matter committed to the discretion of the trial court. *United Sates v. Truslow*, 530 F.2d 257 (4th Cir. 1975). With no abuse of this discretion discoverable, we reject this claim.

Accordingly, the judgments on appeal are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5312

UNITED STATES OF AMERICA,
Appellee,

versus

DORSEY RAY LANG, et al,
Appellants.

ORDER

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en blanc, and no judge having requested a poll on the suggestion for rehearing en blanc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Murnaghan, and Judge Ervin.

For the Court,

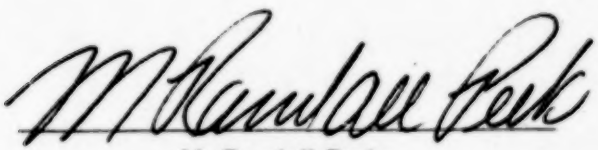
/s/ William K. Slate, II

Clerk

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with three copies of this pleading by depositing in the United States Mail three copies in a properly addressed envelope with adequate postage thereon.

This 14th day of October, 1982.



M. Randall Peek
Attorney for Petitioner